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No. OFFICE OF THE CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1996

COPY-MOR, INC., an Illinois Corporation;
LEONARD STEINBERG; and PHILIP STEINBERG,
Petitioners,
vs.
CALIFORNIA PACIFIC MEDICAL CENTER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

LAWRENCE ALIOTO
465 California Street
Suite 506
San Francisco, CA 94104
(415) 399-0533
Counsel for Petitioners

BOWNE OF SAN FRANCISCO, INC. • 343 SANSOME ST. • S.F., CA 94104 • (415) 362-2300

63 pp

QUESTIONS PRESENTED

1. In 1987 the California Legislature amended California's punitive damages statute, Civil Code 3294, to require that proof of fraud supporting an award of punitive damages must be clear and convincing. It did so to provide stricter procedural safeguards against awards designed to punish, in keeping with the penal purpose of such awards. 9 CEB Civil Litigation Reporter, p. 257 (October 1987).

a. Where, after all the evidence was in in this diversity case, the District Court was of the opinion that the evidence of fraud in this case was thin (Tr. 1557: "I think they beefed up that statute a few years back and made this test higher for punitive damages, and I think it's kind of thin on the fraud."), did the District Court err in submitting the issue of punitive damages to the jury?

b. In affirming the jury's award of $400,000 in punitive damages, did the Court of Appeals err in declining to incorporate California's clear and convincing standard into its standard of review, the standard of review being an issue of federal law, instead reviewing on the basis of the substantial evidence rule?

c. Does the record contain clear and convincing evidence of fraud by petitioners in the inducement of a contract?

2. Where petitioner Copy-Mor's 141 unpaid invoices to respondent hospital were supported by respondent hospital's detailed, authorized written purchase orders, including the prices, and the goods shipped thereunder where accepted by respondent hospital, did the lower Courts err in declining to enter judgment for Copy-Mor on the basis of those prices, instead permitting the jury to determine the "reasonable value" of the goods in question, the jury awarding Copy-Mor $338,000 instead of the invoiced $452,273.05?

3. Where the written supply agreement between the parties provided that prices thereunder for the year 1992

might be set by mutual agreement of the parties, and the evidence of mutual agreement on 1992 prices was overwhelming, did the lower Courts err in upholding the jury's award of $92,000 to respondent hospital for 1992 "overcharge" damages?

4. Did the lower Courts err in upholding the jury's $25,000 award of contract consequential damages in favor of respondent hospital, where that $25,000 could only have represented the fees of respondent's accounting expert for services rendered in the litigation, including testimony as an expert?

LIST OF PARTIES

Plaintiff and Respondent
CALIFORNIA PACIFIC MEDICAL CENTER

Defendants
COPY-MOR, INC.
LEONARD STEINBERG
PHILIP STEINBERG
DAVID STEINBERG

Copy-Mor, Inc. is an Illinois corporation. It has no parents, affiliates or subsidiaries in which outside persons have an interest.

David Steinberg was a party defendant in the trial court. He is an officer of Copy-Mor, Inc., the son of Leonard Steinberg, and the brother of Philip Steinberg. At the end of plaintiff CPMC's case, CPMC announced it has no evidence against David Steinberg (Tr. 1173). The trial court granted David Steinberg's motion for a directed verdict at the end of all the evidence (Tr. 1546).

Because the ensuing judgment did not accurately reflect these facts, and created the impression that David Steinberg had been dismissed by stipulation, David Steinberg, after an

unsuccessful motion in the District Court to modify the judgment, appealed to the Ninth Circuit. However, when the Ninth Circuit required appellants Copy-Mor et al. to reduce the size of their brief, that portion of the brief dealing with David Steinberg's appeal was excised. David Steinberg is not a party to the present Petition.

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9 CEB (California Continuing Education of the Bar) Civil Litigation Reporter, p. 257 (October, 1987).. i

OPINIONS BELOW

The opinion of the Court of Appeals contains a notation that disposition is not appropriate for publication. The opinion of the Court of Appeals is reprinted in the Appendix hereto at pp. A-1 to A-9. The order on petition for rehearing is reprinted at A-10. When it denied the post-trial motions the District Court wrote an opinion. That opinion is included in the Appendix at pp. A-11 to A-15.

JURISDICTION

The Court of Appeals entered its judgment on July 16, 1996. Rehearing was denied on August 29, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the District Court was invoked under 28 U.S.C. § 1332 because of diversity of citizenship, plaintiff CPMC being a California corporation, and defendant Copy-Mor, Inc. being an Illinois corporation. The individual defendants are residents of Illinois.

STATUTES INVOLVED

California Civil Code 3294, as it appeared prior to the 1987 amendment, provided in part:

§ 3294.

(a) In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

* * *

After the 1987 amendment the statute provided in part:

§ 3294.

(a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

* * *

(e) The amendments to this section made by Chapter 1498 of the Statutes of 1987 apply to all actions in which the initial trial has not commenced prior to January 1, 1988.

* * *

California Commercial Code, Section 2709(a) provides in pertinent part:

> § 2709. **Action for the Price.** (1) When the buyer fails to pay the price as it becomes due the seller may recover, together with any incidental damages under the next section, the price
>
> (a) Of goods accepted . . .

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PETITION FOR A WRIT OF CERTIORARI

Petitioners above named respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on July 16, 1996.

STATEMENT OF THE CASE

1. The Parties

Copy-Mor, Inc. is an Illinois corporation engaged in the printing business. It is owned and operated by Leonard Steinberg, his wife Muriel, and their two sons, Philip, a lawyer, and David, an accountant. Copy-Mor employs about 16 persons (Tr. 1509). Its principal place of business is 1716 West Grant Avenue, Chicago, Illinois.

Pacific-Presbyterian Hospital was a private hospital located at Buchanan and Sacramento Street in San Francisco. In 1991 it merged with Children's Hospital, also of San Francisco, to form respondent California Pacific Medical Center ("CPMC") (Tr. 298). The merger is a very important fact in this case. After the merger each of the two hospitals continued to operate, but under joint ownership and management.

2. Pertinent Chronology and Facts Relevant to the Issues Presented for Review

a. Copy-Mor Secures the Contract and in the Pre-Merger Period Delivers on the Promise of a 5% Savings.

On October 18,1990 Copy-Mor and Pacific Presbyterian signed a five-year contract pursuant to which Copy-Mor would supply Pacific Presbyterian's printing needs, historically about $600,000 worth a year, for five years. The contract appears in the Appendix hereto at pp. A-24 to A-29. Copy-Mor obtained the contract by promising a 5% savings in 1991 over the prior vendor's prices, improved service, and a $50,000 guaranteed savings in 1991 (Copy-Mor Ex 1). (The 5% price savings for 1991 is in paragraph 2 of the contract, the $50,000 guaranteed savings for 1991 is in paragraph 9.) One Charles Brown, who was Pacific Presbyterian's materials manager, negotiated and signed the contract (Tr. 82). Philip Steinberg negotiated for Copy-Mor (Tr. 1162). His father, Leonard, signed the contract.

Copy-Mor put an employee, Chuck Blair, on Pacific Presbyterian's premises to work there full time. The contract period started on January 1, 1991. In the first five months and 13 days of the contract, known as the pre-merger period, Copy-Mor sold to the hospital some 11 items at lower prices than its predecessor (Tr. 1034-1038). During that first five months and 13 days, Copy-Mor's prices to Pacific Presbyte-

rian were 5% lower than the prices of its predecessor (Tr. 1353-1361), Moore Business Forms. At trial CPMC's expert concluded that Copy-Mor's pre-merger prices were slightly higher than Moore's (CPMC's Ex 96). David Steinberg pointed out three mistakes in that expert's calculations (Tr. 1353-1361), and showed that Copy-Mor's prices in that period were in fact more than 5% below prior vendors' prices, including Moore's (ibid). In its rebuttal argument to the jury, CPMC conceded that it had no complaint regarding Copy-Mor's prices in the pre-merger period:

> "Pre-merger, I would agree with Mr. Alioto, the prices that Copy-Mor charged from January of '91 up through May of 1991 were competitive. Whether they are $5,000 one way or $5,000 another way really is insignificant, and the fact that David Steinberg found three invoices that he found questionable, I think Mr. Keeler adequately explained the reason. But pre-merger period, we don't have a dispute with that. We don't have a dispute with pre-merger period." (Tr. 1733.)

b. The Merger Period Printing (June 13 through July, 1991).

The cutoff of the merger printing period is indefinite. In the merger period the combined hospitals required all new forms in a short period of time. This was a huge job and Copy-Mor's presses were going 24 hours a day (Tr. 1514-1515). Charles Brown and Leonard Steinberg agreed that the merger production would not be subject to the price provisions of the contract (Tr. 138; Tr. 1513-14). During the merger printing period Copy-Mor's prices were more than twice what they would have been under ordinary circumstances. During the merger Copy-Mor produced forms not only for the Pacific Presbyterian Hospital, but also for the Children's Hospital, with which Copy-Mor had had no prior dealings. As in the case of the pre-merger period, CPMC's

counsel conceded in final agreement that merger period printing was not part of this case.

"Merger, period, we don't have a dispute with that. As to those invoices that are merger-related, yes, we gave them carte blanche on pricing and said, go ahead, charge us whatever you want to charge us, and they did. They charged us dearly, but that's not part of this lawsuit." (Tr. 1734).

c. On September 4, 1991 Charles Brown is Replaced by David Ewer.

David Ewer had the same position at Children's Hospital which Charles Brown had at Pacific Presbyterian, Director of Purchasing. Because of the merger one of them had to go, and it was Charles Brown who lost his job on September 4, 1992 (Tr. 109, 114) and went to work elsewhere. Ewer retained his own functions at Children's and took over Brown's functions at Pacific Presbyterian (Tr. 184). Copy-Mor and the Steinbergs had had no prior dealings with Ewer and did not know him.

At trial Charles Brown testified that through September 4, 1994 he knew of no breach of contract by Copy-Mor (Tr. 160), had received no written complaints about Copy-Mor's prices or services from any of the hospital's 50 departments and had received only two oral complaints about Copy-Mor, one of which he determined was attributable to Copy-Mor's predecessor, and both of which were resolved to Brown's satisfaction (Tr. 115).

d. David Ewer is Put in Charge of CPMC's Vendor Consolidation Program.

The Vendor Consolidation Program provided for the elimination of vendors (i.e., providers of goods or services) whose services overlapped those of other vendors, and for the surviving vendor to service both the Pacific Presbyterian "campus" and the Children's Hospital "campus" (Tr. 219;

CPMC Ex. 61). Pursuant to this program David Ewer eliminated linen suppliers (Tr. 290) and suppliers of maintenance and cleaning supplies (Tr. 291-295), before turning his attention to the printers. Prior to the merger the printing vendors for the Children's Hospital were two companies called Med-Form and K-P Graphics. Copy-Mor was the printer for Pacific Presbyterian prior to the merger.

e. On October 14, 1991 David Ewer meets with the Steinbergs.

The October 14, 1991 meeting of David Ewer with Leonard and Philip Steinberg is pivotal to this case. All parties agree that the meeting ended with the Steinbergs walking out in anger and threatening to sue (Tr. 306; 1225-1226). Leonard and Philip Steinberg testified that Ewer asked them to put the October 18, 1990 five-year contract with Presbyterian aside, i.e. abrogate it, and submit a bid to CPMC against Med-Form and K-P Graphics for the right to supply printing services to both the Pacific campus and the Children's campus of the merged hospitals. The Steinbergs told Ewer that they would insist that CPMC honor the contract between Pacific Presbyterian and Copy-Mor, which CPMC was obliged to do under the agreement of merger (Tr. 297-299).

Ewer testified that all he did was ask Copy-Mor to submit a bid for the right to supply both hospitals and that he did not ask Copy-Mor to set aside or disregard its five year contract with Pacific. It is hard to imagine why the Steinbergs would leave in anger, which Ewer admits they did (App. hereto, p. A-16), if Ewer's version of the substance of the meeting is correct. The transcript of Ewer's and the Steinbergs' testimony regarding the October 14, 1991 meeting is reprinted in the Appendix attached hereto, at pp. A-16 to A-23.

f. Ewer Begins to Make a Record Against Copy-Mor, Seeking Reasons or Excuses for Terminating Copy-Mor's Five-Year Contract.

Ewer sent to his departments a questionnaire asking them to rate the printing vendors (CPMC Ex 6). He received overwhelmingly negative responses concerning Copy-Mor. Over Copy-Mor's objections, these questionnaire responses, which did not come into existence until after a dispute had developed between Copy-Mor and Ewer (Tr. 218; CPMC Ex 61), were received in evidence at the trial of this case.

g. Copy-Mor Breaches the Contract by Failing to Deliver on the Cost Savings Promised for 1991.

The jury below so found on disputed, conflicting evidence (Dkt No. 214). The trial judge properly instructed that the merger-related invoices should not be considered in determining whether Copy-Mor lived up to its promise of a $50,000 savings to Pacific Presbyterian and its successor for 1991. Still this issue turned in large part on where the jury drew the line between merger-related invoices and post-merger business-as-usual invoices. The jury found not only that Copy-Mor did not save Pacific Presbyterian and its successor, CPMC, $50,000 in 1991, but that Copy-Mor's charges for the year wound up $116,000 higher than what the predecessor printing vendors would have charged for the same goods (Tr. 1673).

h. CPMC Terminates Copy-Mor's Contract and Institutes the Present Suit.

On February 3, 1992, CPMC gave notice of intent to terminate Copy-Mor's contract. The parties exchanged numerous pre-litigation letters. On May 13, 1992, CPMC terminated Copy-Mor's contract, ejected its on-site representative, and instituted the present case.

i. CPMC Makes Three Large Post-Termination Orders to Copy-Mor.

On May 28, 1992 CPMC ordered $143,339.88 worth of printed goods from Copy-Mor (Dkt No. 25, file folder 139). Most of the goods were in Copy-Mor's inventory and had been manufactured, with CPMC's logo, during the contract. On June 26, 1992 CPMC ordered an additional $41,406.78 in printed forms from Copy-Mor (Dkt No. 25, file folder 141). On July 8, 1992 CPMC made its last order to Copy-Mor, in the amount of $91,893.99 (Ex 53, p. 388). Ewer signed these three purchase orders. Copy-Mor delivered the goods ordered.

j. CPMC's Balance Due Copy-Mor is $374,068.77 for Delivered Goods and $78,204.25 for Goods Remaining in Copy-Mor's Inventory (Tr. 880).

CPMC's Accounts Payable Department processed Copy-Mor's outstanding unpaid invoices (Tr. 1411-1433). There were about 141 of them (Copy-Mor Ex 53). CPMC's bookkeeper checked Copy-Mor's invoices against CPMC's written, signed purchase orders and against delivery receipts, approved the invoices for payment and drafted checks totaling about $462,711.56 payable to Copy-Mor (Tr. 1411-1433). However, on the advice of counsel for CPMC in this case, CPMC held that money and never paid it to Copy-Mor (Tr. 907), despite CPMC's explicit written promises to pay which accompanied the three large post-termination purchase orders (Copy-Mor Ex's 49, 51).

3. Course of Proceedings and Disposition Below

CPMC was first to file and was the plaintiff below. It sought from Copy-Mor damages for fraud in the inducement of the October 18, 1990 contract and damages in contract, as well as declaratory relief to the effect that it had no liability to Copy-Mor with respect to the unexpired three

and one-half years of the five year contract. Copy-Mor counter-sued for the price of the unpaid invoices, plus prejudgment interest, and for the profits Copy-Mor would have earned in the unexpired three and one-half years of the contract. In pretrial proceedings Copy-Mor made two unsuccessful motions for summary judgment with respect to the unpaid invoices. Also in pretrial proceedings, CPMC amended its complaint to add Leonard, Philip and David Steinberg as individual defendants on the fraud claim.

The case went to trial in Oakland, California before Honorable Claudia Wilkin and a jury of eight persons. Until the actual eve of submission of the case to the jury, it was Judge Wilkin's intention not to instruct on punitive damages (Tr. 1595). She changed her mind on the basis of a case submitted to her by CPMC, *Las Palmas Associates vs. Las Palmas Center Associates* 235 Cal.App.3rd 1220 (1991). That case holds that ordinary fraud will support an award of punitive damages. Judge Wilkin instructed the jury that it must find fraud by clear and convincing evidence. Petitioners Copy-Mor and the Steinbergs' position throughout has been that there is not enough evidence of fraud in the inducement of the contract to submit that issue to the jury, whether the burden of proof be a preponderance or clear and convincing evidence.

In final argument, CPMC made a strong appeal to the local prejudices of the jury ("Abe Lincoln isn't from Chicago, by the way. Al Capone was from Chicago." Tr 1740.).

The jury returned $283,000 in compensatory damages for CPMC against Copy-Mor and the individual defendants. That award consisted of $166,000 for 1991 overcharge damages (i.e. the promised $50,000 savings plus the $116,000 increase), $92,000 in overcharge damages for 1992, and $25,000 for the charges of Arthur Andersen & Co., CPMC's expert (Tr. 1673-1674; Dkt No. 234, p.2). In addition, the jury awarded $400,000 in punitive damages.

$300,000 of this was assessed against Copy-Mor, $75,000 against Philip Steinberg and $25,000 against Leonard Steinberg.

In final argument CPMP argued that Copy-Mor's claim for unpaid invoices should be reduced by 25%, to make those prices more reasonable (Tr. 1674). The jury agreed with this and awarded Copy-Mor $338,000 on its unpaid invoices, instead of the $452,273.02 which Copy-Mor asked the jury to award.

Hence CPMP emerged $345,000 ahead of Copy-Mor, the decisive factor being the $400,000 in punitive damages. The Trial Court denied all post-trial motions and the Ninth Circuit affirmed.

REASONS FOR GRANTING THE WRIT

1. Petitioners are Not Guilty of Fraud in the Inducement of the Contract.

Fraud in the inducement of a contract requires proof that the promises which induced the contract were made without intent to perform. *Las Palmas Associates v. Las Palmas Center Assoc.* 235 Cal.App.3rd 1220 (1991). In order to support an award of punitive damages, that fraud must be proved by clear and convincing evidence. California Civil Code 3294, quoted above in Statutes Involved. Clear and convincing evidence consists of evidence so clear "as to leave no substantial doubt" and "sufficiently strong to command the unhesitating assent of every reasonable mind." *Pacific Group v. First State Insurance Co.* 841 F. Supp. 922, 939 (N.D. Ca. 1993).

The contract in the case at bar was induced by Copy-Mor's promise of lower costs, better service, and a $50,000 saving in year one of the contract. See Charles Brown's memo to all departments, November 10, 1990, being Copy-

Mor Exhibit 1 in evidence: "Why are we changing forms vendors? Two compelling reasons: 1) a reduction in vendors from six to two — Speeding Printing and Copy-Mor, and 2) a guaranteed substantial dollar savings in year one."

The contract in paragraph 2 provides that prices thereunder shall be determined by "the price list attached hereto as Exhibit A." (App. hereto, p. A-24) No price list was ever attached to the contract. Both of the lower Courts concluded that this was evidence of Copy-Mor's intent not to perform the contract-inducing promise of lower costs.

Prior to commencement of the contract Charles Brown caused Ken Pearson of Pacific Presbyterian's Stores Department to generate a computer printout (Tr. 74, 86-89; 142-151; 641-644). The printout referred to some 90 forms and contained prices and usages of those forms. Brown caused Pearson to give the printout (CPMC Exhibit 17) to Copy-Mor (ibid). Philip Steinberg testified that exhibit 17 was to constitute Exhibit A to the contract, as is (Tr. 1194). In his deposition Charles Brown also testified that exhibit 17 was to constitute the Exhibit A price list (Tr. 147). At trial he changed his testimony and said that since paragraph 2 of the contract promised a 5% average cost savings to the hospital, exhibit 17 could not, as is, be the Exhibit A price list, since exhibit 17 set forth the prices of the prior vendor, Moore Business Forms. He testified that exhibit 17 could only be the "basis" of Exhibit A to the contract (Tr. 148).

In this Brown is mistaken. The paragraph 2 promise of a 5% cost savings was conditioned upon the availability of long printing runs ("quantities of forms ordered") (App. p. A-24 & 25). If Copy-Mor was required to take 5% off the exhibit 17 prices and attach the result to the contract as Exhibit A, that would make the Exhibit A prices unconditional and guaranteed and render nugatory the paragraph 2 condition on the 5% lower average cost savings, namely that the "quantities of forms ordered" be comparable to the quanti-

ties ordered by prior vendors. Under the agreement of the parties it would have been perfectly valid for Philip Steinberg to attach exhibit 17, as is, to the contract as Exhibit A. His failure physically to attach exhibit 17 to the contract is not evidence of fraud since both sides of the contract were in possession of exhibit 17. A year and three months later when David Ewer asked for Exhibit A to the contract, Philip Steinberg sent him exhibit 17, having changed only the logo from that of the prior vendor, Moore Business Forms, to Copy-Mor (Tr. 276-278).

The contract did not contemplate that the Exhibit A price list be exhaustive. The contract provided that the price of items not listed on Exhibit A should be mutually agreed upon by the parties (App. p. A-25). It also provides that the Exhibit A prices are subject to modification upon mutual agreement (App. p. A-24).

The absence of an Exhibit A price list attached to the contract did not permit Copy-Mor to slip prices past the hospital. The hospital, both Pacific Presbyterian and CPMC, never paid an invoice unless that invoice matched the price on a purchase order signed by an authorized agent of the hospital (Tr. 950-951; 969-971; 125). Those agents never signed a purchase order unless the price was already on it (Tr. 947; 969; 123). Chuck Blair of Copy-Mor never altered or put a price on a purchase order after the purchase order had been signed by the hospital's representative (Tr. 1082).

Both lower Courts ascribe as evidence of fraud in the inducement Copy-Mor's failure to provide CPMC with the first semi-annual report provided by the contract. This report was due July 1, 1991, right in the middle of the round-the-clock activity of the merger printing. CPMC is not complaining of Copy-Mor's prices in the pre-merger period (January 1, 1991 to June 13, 1991) (Tr. 1733), and those prices were in fact 5% lower than those of prior

vendors (Tr. 1353-1361). Brown knew of no breach of the contract by Copy-Mor through September 4, 1991 (Tr. 114-115; 160), the date of his departure. Hence Copy-Mor's failure to file a semi-annual report in July of 1991 cannot be interpreted as an attempt to conceal a breach of the contract.

When Leonard Steinberg had finished testifying, CPMC told the Court that CPMC was willing to dismiss the fraud claim against Leonard (Tr. 1548-1549: "Mr. Schofield: I would dismiss the intentional count against Leonard Steinberg, but I would pursue it against Philip Steinberg.") The *only* evidence against Leonard is that at trial he testified *he* never promised the hospital lower prices (App. p. A-6). The Ninth Circuit reads this testimony to mean that Copy-Mor never promised lower prices and concludes that since the contract provides for lower prices, Leonard was not telling the truth at trial (App. A-6). But Leonard testified at p. 1549 that he, Leonard, did not promise lower prices. Although Leonard signed the contract, it was negotiated by Philip (Tr. 1527 —"I didn't negotiate the contract. Philip Steinberg negotiated the contract.") The Court will find nothing in this record which justifies a punitive damage award against Leonard Steinberg.

The jury could have found that after the October 14, 1991 meeting with Ewer, perceiving that it would soon be terminated, Copy-Mor intentionally breached the contract-inducing promise of a $50,000 guaranteed savings in year one of the contract. After Ewer's signal, that promise became a pure burden with no countervailing benefit, i.e., no additional four years of profits. But that does not mean that the said promise, when made to Brown back in October of 1990, was made without intention to perform. Fraud in the inducement of a contract is negated by sustained performance of the contract followed by an intervening event giving rise to the breach. *Kaylor v. Crown Zellerbach* 643 F.2d 1362, 1368

(9th Cir. 1981); *Justheim Petroleum Co. v. Hammond* 227 F.2d 629, 637-638 (10th Cir. 1955). In the latter case the Court of Appeals vacated the jury verdict of fraud in the inducement. But for such a rule, most breaches of contract would be the basis of a fraud claim for punitive damages. Such a rule directly applies to this case. Here the intervening event was the merger and Ewer's October 14, 1991 notice to the Steinbergs.

2. There is No Evidence that Copy-Mor or its Agents Unilaterally Modified Prices Upon Receipt of Hospital Purchase Orders.

According to the July 16, 1996 Memorandum of the Court of Appeals, there was evidence in the record from which the jury could find that Copy-Mor unilaterally modified prices upon receipt of hospital purchase orders (App., p. A-6). There is *no* such evidence in the record. Charles Blair of Copy-Mor testified: "Q. Okay. Did you ever put a price on a purchase order after Ms. Willis signed the purchase order? A. Not to my knowledge." (Tr. 1082).

Both Blair of Copy-Mor and Jessie Willis of CPMC described the ordering process for both non-stock items (i.e. requests from the departments of the hospital) and stock items (i.e. requests from the stores department). Blair, Tr. 1087-1089 (direct); Tr. 1134-1141 (cross); Jessie Willis, Tr. 928-935 (direct) (Exhibits 48, 47A, and 46 referred to at Tr. 932-933 may be found in CPMC's Excerpts of Record in the Court of Appeals at pp. 127-129); Tr. 942-954 (cross). These 32 pages of testimony may be summarized as follows:

non-stock items

— A department of the hospital generates a handwritten or typewritten request for forms. This is known as a purchase requisition. Typically the requisition contains no price.

— The purchase requisition is delivered to Chuck Blair of Copy-Mor, either directly by the requesting department or through Jessie Willis of the Purchasing Department.

— Blair obtains from Chicago (Philip Steinberg) a price and in his own hand puts the price on the purchase requisition, crossing out the old price if there was one.

— Blair delivers the purchase requisition to Jessie Willis.

— Jessie Willis types up the purchase order from the information on the purchase requisition. She then signs the purchase order, delivers a copy of the purchase order to Blair and sends a copy of the purchase order to the Accounts Payable Department of the hospital.

stock items

— Ken Pearson of stores or the computer itself generates a computerized, unsigned purchase order for forms. The purchase order sets forth the last price the hospital paid for the form in question.

— The computer-generated purchase order is delivered to Blair.

— Blair obtains from Chicago (Philip Steinberg) a price. If that price is different from the price already on the computer-generated purchase order, Blair crosses out the old price and writes in the new one in his own hand.

— Blair delivers a copy of the computerized purchase order to Jessie Willis.

— Jessie Willies inputs the new price into the computer, generates a new purchase order with the new price on it, signs it, delivers a copy to Blair, and sends it to the Account Payable Department of the hospital (Tr. 950 lines 18-20).

The signed purchase order is the hospital's written promise to pay the prices appearing thereon (Tr. 123; 153; 155; 967-969).

Subsequently, after delivery of the goods, Copy-Mor sends to the hospital an invoice. If the price on the invoice does not agree with the price on the purchase order which had been sent by Jessie Willis or her department to Accounts Payable, Accounts Payable will not pay the invoice (Tr. 935 lines 18-22; Tr. 950-951; Tr. 1417).

The evidence concerning Jessie Willis' authority is beyond dispute. Charles Brown, the hospital's head of purchasing, testified: "Q. Did Ms. Jessie Willis, did she sign a lot or many of the purchase orders for printed materials? A. I presume so. Q. All right. Did she have your authority to do that? A. She did. Q. And you were an officer of the corporation? What was your title at that time? A. I was Director of Materials Management." (Tr. 122-123); "Q. Now, do you regard Jessie Willis as a competent employee? A. I do. Q. She was authorized by you to sign and deliver purchase orders? A. On forms, yes. Q. Relating to the purchase of forms? A. Yes." (Tr. 156). See also Jessie Willis' testimony: "Q. All right, you had authority to sign purchase orders for printed forms? A. Yes. Q. Who gave you that authority? A. Charles Brown. Q. And what was his position? A. Director of the department." (Tr. 954).

Hence, the Court of Appeals' determination on page 6 that "CPMC produced evidence from which the jury could infer that . . . [Copy-Mor] unilaterally modified prices upon receipt of hospital purchase orders" should be reversed. CPMC has produced no such evidence. Of the four points which the Court of Appeals refers to as evidence of fraud, this unsupported point — Copy-Mor's unilateral modification of prices upon receipt of hospital purchase orders — is the only one which clearly indicates fraud.

3. The Court of Appeals Erred in Declining to Incorporate California's Clear and Convincing Standard into its Standard of Review.

The standard of review, even in a diversity case, is an issue of federal law. *Glovatorium, Inc. v. NCR Corp.* 684 F.2d 658 (9th Cir. 1982). In their review of state court criminal convictions on habeas corpus, this Court has required the lower courts to review the evidence and determine whether a reasonable person could find guilt beyond a reasonable doubt. *Jackson v. Virginia* 443 U.S. 307, 99 S.Ct. 2781, 2789 (1979). In that case this Court incorporated the burden of proof standard into the standard of appellate review. Certainly where a state statute requires proof of clear and convincing evidence, the proper appellate standard when reviewing the evidence is not the substantial evidence rule used by the Court of Appeals in this case (Appendix, p. A-5) but is, as Petitioners urged below (July 18, 1995 Opening Brief, pp. 1, 3; September 29, 1995. Reply brief, pp. 8-10), whether a reasonable person could find fraud in the inducement by clear and convincing evidence.

Punitive damages take more from a person or a company than just money. Holding up a party as an example of how not to behave, a punitive damage award is a stigma in the society. *Pacific Mutual Life Ins. v. Haslip*, 499 U.S. 1, 111 S.Ct. at p. 1062. This Court has noted such an award's relationship to criminal liability, *Browning Ferris Industries v. Kelco Disposal Inc.* 492 U.S. 257, 109 S.Ct. 2929, 2932 (1989), and has spoken approvingly of the states' efforts to impose objective standards on a jury's discretion to fix the amount of punitive damages in *Pacific Mutual Life Ins. v. Haslip* 499 U.S. 1, 111 S.Ct. 1032 (1992). In *BMW of North America Inc. v. Gore*, 116 S.Ct. 1589 (1996) this Court reversed a punitive damage award as inconsistent with due process.

There is a special class of cases in which the federal courts will review de novo the findings of the trier of fact. *Fiske v. Kansas* 274 U.S. 380, 47 S.Ct. 655; *Baumgartner v. United States* 322 U.S. 665, 64 S.Ct. 1240; *Bose Corp. v. Consumers Union* 466 U.S. 485, 104 S.Ct. 1949 (1984). So much is not required here. But the substantial evidence rule is not an appropriate standard in reviewing entitlement to punitive damages, especially where the state requires clear and convincing evidence.

4. Merchants Must Be Able to Rely Upon Authorized Detailed Purchase Orders.

All of Copy-Mor's unpaid invoices for delivered goods in this case were supported by signed detailed purchase orders which included the price (Tr. 1411-1433; Copy-Mor Ex 53). Agents of CPMC admitted that those written purchase orders constituted the hospital's promise to pay the prices thereon (Brown: Tr. 123; 153; 155; Hagerty: Tr. 967-969). When a seller delivers the goods specified in such orders, and the buyer accepts them, the seller is entitled to the price specified in the purchase order. California Commercial Code 2709(1)(a), and no doubt the commercial codes of the other states, so provide. The evidence of mutual agreement in this case, both with respect to the pre-termination single-item purchase orders signed by Jessie Willis and also with respect to the three large post-termination purchase orders signed by David Ewer, left nothing for the jury to decide. To allow the jury to reduce by 25% (Tr. 1674) or any other amount the agreed upon prices set forth on those purchase orders was completely illegal.

This Court should direct the trial Court to enter judgment for Copy-Mor in the full amount of the unpaid invoices for delivered goods, $374,068.78, plus prejudgment interest on the amounts by which such award exceeds the final award to CPMC.

With respect to unpaid invoices for goods remaining in Copy-Mor's inventory ($78,205.27), CPMC disputed below that such forms were authorized committed forms within the meaning of paragraph 7 of the contract. Apparently Copy-Mor won the verdict on this issue, the jury apparently having deducted 25% from the sum of unpaid invoices for delivered goods and unpaid invoices for goods remaining in Copy-Mor's warehouse to arrive at the $338,000 awarded to Copy-Mor. The matter of liability for goods remaining in inventory should be remanded for new trial.

5. In Awarding CPMC $92,000 with Respect to 1992 Overcharge Damages, the Lower Courts Made a New Contract for the Parties.

The award of $92,000 in overcharge damages for 1992 is based on the assumption that the parties did not mutually agree on the prices to be paid for transactions between them in 1992. (Appendix, p. A-3: "The district court found that the contract contemplated that CPMC would continue to enjoy the promised favorable pricing until modified by mutual agreement.") Since the 1992 prices were the product of mutual agreement of the parties, and since such prices were in all respects consistent with the written agreement of the parties, there was, again, as in the case of the jury's reduction of the amounts due Copy-Mor on the unpaid invoices, no legal basis for overcharge damages with respect to 1992.

6. There Is No Competent Evidence Supporting The Award of $25,000 to CPMC as Consequential Damages.

CPMC sought and received from the jury $25,000 in respect of the services of Keeler of Arthur Andersen and his associates (Dkt. No. 234, p. 2; Tr. 1672-1674). Keeler testified that he was retained by CPMC in "early May" 1992 (Tr. 989). At that time he and his associates spent two

days at CPMC (Tr. 990) analyzing invoices. CPMC filed this lawsuit on May 13, 1992. It is impossible that Keeler could have generated $25,000 in billings between the time he was hired, "early May," and May 13, 1992. Keeler testified that as of the time he testified at trial, November 8, 1994, two and one half years after the original hiring, the total fees paid to Arthur Andersen was $26,000, and that $26,000 was all that Arthur Andersen had billed for its services in the case to that time (Tr. 1049-50). As of November 8, 1994 Keeler and Arthur Andersen had completed all of the invoice analyses (CPMC Exhibits 94 through 99) which CPMC used in the case. The only figure in evidence supporting the jury's award of $25,000 as compensatory damages to CPMC in respect of Arthur Andersen's fee is Keeler's testimony that his firm had invoiced and been paid $26,000 "to date" (i.e. to November 8, 1994) (Tr. 1049-50).

It seems clear that CPMC has been permitted to recover through the verdict its expert witness fees in the case.

The Trial Court was at first disinclined to instruct on consequential damages (Tr. 1592) ("I don't see that you have proved any reasonably certain consequential damage that the jury could find.") It then decided to instruct on consequential damages, noting that CPMC's evidence of consequential damages was weak (Tr. 1593).

The expenses of litigation are not recoverable for breach of contract, where the litigation is between the contracting parties. *Corbin on Contracts*, Para. 1037, fn. 68. What CPMC has accomplished in this case is a circumvention of the rule disallowing as costs the expenses of a party's expert witnesses, including accountants, in the federal court. *Crawford Fitting Co. v. J. T. Gibbons, Inc.* 482 U.S. 437, 107 S.Ct. 2494 (1987). For these reasons CPMC's compensatory award of $283,000 should be reduced by $25,000.

CONCLUSION

The writ of certiorari should be granted.

The Court should consider summary reversal directing the Court of Appeals:

a. To reconsider the evidence of fraud against the following standard: *whether a reasonable person could find by clear and convincing evidence that Copy-Mor and the Steinbergs were guilty of fraud in the inducement of the contract;*

b. To enter judgment for Copy-Mor in the amount of $374,068.18 in lieu of the $338,000 awarded by the jury, and to remand to the trial Court for fixing of prejudgment interest and for retrial of Copy-Mor's claim for $78,204.27 with respect to goods in inventory;

c. To reduce CPMC's compensatory award by the amount of $92,000 with respect to 1992 overcharge damages and $25,000 with respect to charges of CPMC's expert witness.

Respectfully submitted,

Lawrence Alioto
Attorney for Petitioners

October 4, 1996.

APPENDICES

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No. 95-15385

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CALIFORNIA PACIFIC MEDICAL CENTER,
a California non-profit corporation,
Plaintiff-Appellee,
vs.
COPY-MOR, INC., an Illinois corporation;
LEONARD STEINBERG; PHILIP STEINBERG,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of California
Claudia Wilken, District Judge, Presiding

Argued and Submitted May 15, 1996
San Francisco, California

MEMORANDUM*

D.C. No. C-92-1740 CW

FILED JULY 16, 1996
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

Before: T.G. NELSON, TASHIMA, Circuit Judges and BURNS, District Judge.**

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** Honorable James M. Burns, Senior District Judge for the District of Oregon sitting by designation.

I. OVERVIEW

Copy-Mor, Inc., an Illinois corporation, and its three principals appeal both the jury verdict and the denial of their motions for a new trial, and judgment notwithstanding the verdict in this breach of contract action brought by California Pacific Medical Center (CPMC). CPMC sued Copy-Mor and its principals for fraudulent inducement and breach of a 5-year exclusive contract whereby Copy-Mor agreed to supply all of CPMC's predecessor-in-interest's form printing needs. Copy-Mor counterclaimed for the value of unpaid invoices for forms delivered prior to the filing of CPMC's suit, as well as undelivered forms held at its warehouse in Illinois.

The jury awarded CPMC compensatory and punitive damages against Copy-Mor and its principals. The jury also ruled in favor of Copy-Mor on its counterclaim; however, it reduced the award by approximately 25% of the face value of the invoices.

We affirm the jury's verdicts, and the district court's denial of Copy-Mor's post-trial motions.

II. DISCUSSION

A. Admission of Evidence on 1992 Contract Overcharges.

We review for an abuse of discretion, and will not reverse unless prejudice is shown. *City of Long Beach v. Standard Oil Co.*, 46 F.3d 929, 936 (9th Cir. 1995); *see also Larez v. Los Angeles*, 946 F.2d 630, 641 (9th Cir. 1991).

At trial, CPMC introduced an exhibit prepared by its expert witness that compared Copy-Mor's prices for 1992 (contract year 2) with those charged by previous vendors for the same inventory items. Copy-Mor objected based on the assertion that the contract only guaranteed savings on previous vendors' prices for the first year — 1991. Copy-Mor

argues that the evidence was prejudicial because $92,000 of the compensatory damage award was attributable to 1992 overcharges.

The district court found that the contract contemplated that CPMC would continue to enjoy the promised favorable pricing until modified by mutual agreement. Thus, the jury could reasonably find that the prices charged in 1992 were in breach of that contractual promise.

Moreover, CPMC also made the distinct allegations that Copy-Mor's average price was approximately 33% higher than current market prices, and that Copy-Mor engaged in a fraudulent scheme whereby it unilaterally set excessive prices in breach of the parties' agreement. Thus, introduction of evidence related to Copy-Mor's 1992 prices was not an abuse of discretion because it was relevant to these specific aspects of CPMC's claim for damages.

Copy-Mor also argues that evidence of any 1992 pricing promises was inadmissible under the parol evidence rule. However, the parol evidence rule does not bar evidence that is consistent with a meaning to which a contract is reasonably susceptible. *Brinderson-Newberg Joint Venture v. Pacific Erectors, Inc.*, 971 F.2d 272, 277 (9th Cir. 1990). As discussed, the district court found that the contract contemplated that the promised price discounts for 1991 would continue until modified by mutual agreement of the parties. Thus, evidence of 1992 overcharges is consistent with this interpretation of the parties' agreement, and its admission was not an abuse of discretion.

B. CPMC'S $25,000 Damage Award Attributable to Accountant's Fees.

We will uphold the jury's finding of the amount of damages unless the amount is grossly excessive or monstrous, clearly not supported by the evidence, or based only on speculation or guesswork. *Los Angeles Memorial Coli-*

seum Comm'n v. Nat'l Football League, 791 F.2d 1356, 1360 (9th Cir. 1986). Further, we review a district court's denial of a motion for a new trial for an abuse of discretion. *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 278 (1989).

According to Copy-Mor, $25,000 of the $283,000 damage award was attributable to CPMC's expert witness fees, rather than any consequential damages arising as a result of Copy-Mor's breach.

Copy-Mor cites *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987), for the proposition that awards of a party's expert witness costs are disallowed in the federal courts. However, *Crawford Fitting* cannot be read for the blanket proposition that expert witness fees can never be recovered The decision merely acknowledges the statutory limits on the amount that a federal court may award. *Id.* at 439.

In *Los Angeles Memorial Coliseum Comm'n*, we noted that an appellate court should "undertake only limited review of jury damages awards . . . . " 791 F.2d at 1365. "Even a total inadequacy of proof on isolated elements of damages claims submitted to a jury will not undermine a resulting aggregated verdict which is nevertheless reasonable in light of the totality of the evidence." *Id.* at 1366.

Here, the district court entered judgment on CPMC's breach of contract claim in the amount of $283,000, with no breakdown of the separate elements included within the award. Copy-Mor assumes that the $25,000 was awarded as consequential damages because CPMC's expert witness testified that the accounting fees generated to date were around $26,000. However, there is nothing on the face of the

jury's award to support this assumption.[1] Therefore, we find that the jury's aggregated compensatory damage award is reasonable in light of the totality of the evidence of Copy-Mor's breach. *See id.* at 1366.

C. The Jury's Finding of Fraudulent Inducement and Award of Punitive Damages.

We review a jury verdict for substantial evidence. *See Murray v. Laborers Union Local No. 324*, 55 F.3d 1445, 1452 (9th Cir. 1995). We review a district court's denial of a motion for a new trial or remittitur of punitive damages for an abuse of discretion. *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989).

Copy-Mor argues that CPMC's evidence of fraud was insufficient to support the verdict, The district court rejected Copy-Mor's motion for a new trial on this ground, finding that "[t]he verdict was not against the weight of the evidence or seriously erroneous."

California law defines fraud as "the making of a promise done without an intention of performing the obligation." *Las Palmas Assoc. V. Las Palmas Center Assoc.*, 235 Cal. App. 3rd 1220, 1238 (1991)(citing Calif. Civ. Code § 1710(4)). "[T]he subsequent conduct of a defendant, such as his failure to immediately carry out his pledge has some evidentiary value to show that a defendant made the promise without the intent to keep the obligation." *Id.* at 1239 (citations omitted).

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[1]The district court addressed this assumption in its order denying Copy-Mor's motion for a new trial on compensatory damages. The court found that even if the $25,000 was awarded as consequential damages, "[t]he jury could reasonably find that Plaintiff's expenses in retaining an accounting firm to evaluate the pricing performance resulted from the breach of the contract and were reasonably foreseeable at the time the contract was made. . . ."

As the district court noted, CPMC produced evidence from which the jury could infer that Copy-Mor's principals never intended to honor their contractual promises, including that they: 1) failed to provide an itemized price list, then offered non-credible reasons for their belief that the parties agreed to use the prior vendor's prices; 2) unilaterally modified prices upon receipt of hospital purchase orders; 3) asserted frivolous reasons for not honoring the price savings guarantees; and 4) failed to provide the semi-annual cost analyses required under the contract. Further, CPMC points to Leonard Steinberg's testimony that Copy-Mor never promised to lower its prices as compared to previous vendors — a statement that was contrary to the explicit terms of the contract.

These facts meet this Circuit's standard of "such relevant evidence as reasonable minds might accept as adequate to support a conclusion." *See Murray*, 55 F.3d at 1452. Thus, the jury's conclusion that Copy-Mor's principals committed fraud is supported by substantial evidence, and the district court did not abuse discretion by denying Copy-mor's motion for a new trial, or remittitur of the damage award in the alternative, on this ground.[2]

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[2]In a citation of supplemental authority filed after submission of this case, Copy-Mor draws our attention to the recent Supreme Court decision in *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996) which reversed a jury's punitive damage award as "grossly excessive" in light of the low level of reprehensibility in the defendants' conduct, and the 500:1 ratio between the punitive damage award and the plaintiff's actual damages. Because the $400,000 punitive damage award determined here is not "grossly excessive" as compared to the $283,000 compensatory damage figure, we cannot conclude that the award "enter[s] the zone of arbitrariness that violates the Due Process Clause. . ." *Id.* at 1595. Further, we reject Copy-Mor's contention that a "closer" standard of review is warranted when analyzing the factual determinations underlying a jury's award of punitive damages. Neither the *BMW* case, nor Ninth Circuit precedent compels more heightened scrutiny than a review for substantial evidence.

D. Denial of Copy-Mor's Motion For Judgment Notwithstanding The Verdict On Its Counterclaim.

We review the denial of a motion for judgment notwithstanding the verdict de novo. *Bank of the West v. Valley Nat'l Bank of Arizona*, 41 F.3d 471, 477 (9th Cir. 1994).

Copy-Mor argues that the jury erroneously reduced its counterclaim damage award from the $452,273.03 ($374,068.78 for goods delivered plus $78,204.25 for goods held in Copy-Mor's Chicago warehouse) originally claimed to $338,000 — representing an approximate 25% reduction from the total.

Under California law, where parties to a contract intend not to be bound unless a price is fixed or agreed, the buyer is liable for the "reasonable value" at the time of delivery for any goods already received. *See* Calif. Comm. Code § 2305 (West. Ann. 1964). As the district court noted, Copy-Mor's employee testified that the prices on the purchase orders were unilaterally set by Philip Steinberg.

Based on this and other evidence presented, the jury could reasonably find that there was no agreement from anyone with authority at CPMC to the prices on Copy-Mor's invoices. Further, the jury was properly instructed in accordance with California Commercial Code section 2305, that if they found no meeting of the minds with respect to price, they should find that CPMC was liable to Copy-Mor for the reasonable value of the goods sold and delivered.

Thus, the jury's reduction on Copy-Mor's counterclaim was reasonable in light of the evidence produced regarding Copy-Mor's breach of the price terms of the agreement. Accordingly, the district court properly denied Copy-Mor's motion for judgment notwithstanding the verdict.

E. Admission of Survey Results.

We review for an abuse of discretion. *City of Long Beach*, 46 F.3d at 936; *See also Larez*, 946 F.2d at 641.

Copy-Mor argues that the district court improperly admitted the results of a survey conducted prior to the instant litigation by CPMC on forms vendor performance. The district court found several independent bases for admission of the surveys including, *inter alia*, to show CPMC's materials manager's state of mind as relevant to Copy-Mor's claim that CPMC terminated the contract in bad faith, and for the non-hearsay purpose of showing CPMC's notice to Copy-Mor of its poor performance under the contract.

"If evidence, otherwise hearsay, falls within any exception to the hearsay rule, it is admissible." *Sica v. U.S.*, 325 F.2d 831, 836 (9th Cir. 1963), *cert. denied* 376 U.S. 952 (1964). The trial court acted within its discretion by admitting the surveys on these two grounds because the evidence was central to CPMC's defense against Copy-Mor's claim that it terminated the contract in bad faith, and with improper motive. *See also Forro Precision, Inc. v. International Business Machines Corp.*, 673 F.2d 1045, 1057 (9th Cir. 1982) (holding that trial court did not abuse its discretion by admitting hearsay evidence for the limited purpose of showing defendant's state of mind).

Copy-Mor's contention that the evidence was unduly prejudicial is similarly without merit because there was ample evidence from which the jury could conclude that Copy-Mor's poor performance under the contract justified CPMC's termination. *See, e.g., Ackley v. Western College of Teamsters*, 958 F.2d 1463, 1470 (9th Cir. 1992) (an erroneous evidentiary ruling is prejudicial unless "it is more probable than not that the result in the district court was untainted by the error.").

Further, as CPMC points out, five of the eleven survey respondents who rated Copy-Mor negatively were called as witnesses, and were cross-examined by Copy-Mor. Thus, it is unlikely that any prejudice resulting from admission of the surveys tainted the jury's ultimate findings.

III. CONCLUSION

We affirm the jury's verdicts in all respects. Similarly, the district court's order denying Copy-Mor's motions for a new trial and judgment notwithstanding the verdict are also AFFIRMED.

No. 95-15385

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CALIFORNIA PACIFIC MEDICAL CENTER,
a California non-profit corporation,
Plaintiff-Appellee,
vs.
COPY-MOR, INC., an Illinois corporation;
LEONARD STEINBERG; PHILIP STEINBERG,
Defendants-Appellants.

ORDER

D.C. No. C-92-1740 CW

FILED JULY 16, 1996
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

Before: T.G. NELSON, TASHIMA, Circuit Judges and BURNS,* District Judge.

Appellants, "Petition for Rehearing" is DENIED.

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* Honorable James M. Burns, Senior United States District Judge for the District of Oregon, sitting by designation.

No. C 92-01740 CW

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

CALIFORNIA PACIFIC MEDICAL CENTER,
a California
nonprofit corporation,
Plaintiff,

vs.

COPY-MOR, INC., an Illinois corporation;
LEONARD STEINBERG;
PHILIP STEINBERG; DAVID J. STEINBERG,
Defendants.

COPY-MOR, INC.,
Counter-claimant.

vs.

CALIFORNIA PACIFIC MEDICAL CENTER,
Counter-defendant.

ORDER DENYING DEFENDANTS' MOTIONS FOR NEW TRIAL, MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT, AND MOTION TO AMEND THE JUDGMENT

FILED FEB 7, 1995
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND

Defendants' motions for new trial, for judgment not withstanding the verdict, and to amend the judgment were heard on February 3, 1995. Having considered all the papers filed and arguments made by the parties, and finding no good cause for the relief sought, the Court hereby DENIES

each of the motions in its entirety for the reasons stated below.

1. Legal Standards

A motion for new trial based on the claimed insufficiency of the evidence may be granted only if "the verdict is against the great weight of the evidence,, or "it is quite clear that the jury has reached a seriously erroneous result." *Digidyne Corp v. Data General Corp.*, 734 F.2d 1336, 1374 (9th Cir. 1984), *cert. denied*, 473 U.S. 908 (1985). A motion for judgment notwithstanding the verdict may be granted only "when the evidence permits only one reasonable conclusion as to the verdict." *Venegas v. Wagner*, 831 F.2d 1514, 1517 (9th Cir. 1987). The court views the evidence in the light most favorable to the non-moving party and draws all reasonable inferences in favor of that party. If "reasonable minds could differ over the verdict," the motion must be denied. *Id.*

2. Motion for New Trial on Plaintiff's Compensatory Damages

Defendant Copy-Mor asserts that the award of $283,000.00 in compensatory damages is excessive and not supported by substantial evidence. This argument is based upon the explicit argument that no damages could be awarded for the year 1992 and upon the unstated premises that an award of $50,000.00 on the contract guarantee was not supported by evidence and an award of $25,000.00 consequential damages was unwarranted.

Defendant argues that because the contract promised specific savings only for the year 1991, there can be no basis for finding overcharges in 1992. However, the contract provided that prices would be set by two mechanisms: first, a price list to be supplied by Defendant Copy-Mor, which was to reflect the promised 5% price discount; and second, the agreement of the parties. Thus, although the specific savings

promised in the contract were promised only for the year 1991, the prices which were to result in those savings were to continue until changed by mutual agreement. Accordingly, the contract did contemplate that Plaintiff would continue to enjoy the promised favorable pricing a in 1992, and the jury could reasonably find that the prices charged in 1992 were in breach of that contractual promise.

The award of $50,000.00 on the contractual guarantee was proper if the jury could reasonably have found that Plaintiff's level of purchasing from Defendant Copy-Mor in 1991, excluding the merger related orders, was at least equal to its 1990 level of purchasing. There was conflicting testimony as to the volume of purchasing attributable to the merger. The jury could reasonably accept the testimony of Plaintiff's expert and reject that of Defendant's expert, and thus could reasonably find that the 1991 level of purchasing exceeded the 1990 level. Its verdict was not against the weight of the evidence nor clearly erroneous.

Finally, the award of consequential damages was not contrary to the evidence, which showed that Defendant Copy-Mor did not comply with its contractual obligation to provide a price list and semi-annual reports to allow Plaintiff to monitor Defendant's performance with respect to the favorable pricing provisions of the contract. The jury could reasonably find that Plaintiff's expenses in retaining an accounting firm to evaluate the pricing performance resulted from the breach of the contract and were reasonably foreseeable at the time the contract was made in the event of such a breach.

Therefore, Defendant's motion must be denied.

3. Motion for J.N.O.V. on Defendant's Unpaid Invoices Claim

Defendant Copy-Mor argues that it is entitled to entry of a judgment notwithstanding the verdict for the full amount

of its claim on the unpaid invoices, plus pre-judgment interest, because the evidence requires a finding that CPMC's purchase orders constituted a promise to pay the prices set forth on the order. However, there was sufficient evidence to support a finding that the purchase orders did not constitute an agreement to the prices. For example, Charles Blair, Defendant Copy-Mor's representative, testified that the price stated on the purchase orders was set unilaterally by Defendant Philip Steinberg. Therefore, the jury could reasonably have found that there was no agreement as to the price, and judgment notwithstanding the verdict would be improper.

4. Motion for New Trial or J.N.O.V. on Punitive Damages

Defendants Philip Steinberg and Leonard Steinberg argue that the record contains no clear and convincing evidence of fraud, in that the applicability of the contractual pricing guarantees were conditional, and there were material issues of fact as to whether the conditions were met. It is true that a finding of fraud would be improper if the jury found that Defendants failed to deliver on these guarantees because they believed in good faith that the conditions had not been met. However, there was sufficient evidence to support a finding that Defendants did not have such a good faith belief.

Plaintiffs adduced evidence that Defendants failed to provide the price list contemplated by the contract and instead put into place a system whereby they unilaterally set prices on receipt of purchase orders, that Defendants failed to provide semi-annual reports required by the contract, that Defendants asserted frivolous reasons for not honoring the price savings guarantees, and that Defendants failed to instruct their representative to carry out the services required by the contract which were to achieve the promised cost savings. The jury could reasonably credit this evidence

and inter from it that Defendants had never intended to honor the contractual pricing promises. The verdict was not against the weight of the evidence or seriously erroneous. Accordingly, this motion must also be denied.

5. Motion to Amend Judgment

Defendant David Steinberg moves to amend the judgment to state that the Court granted his motion for dismissal, and to grant him costs of suit against Plaintiff. However, while the Court, on the stipulation of Plaintiff, dismissed the counts against David Steinberg so as not to send his name to the jury for purposes of determining his own individual liability, the Court expressly reserved the issue of whether Plaintiff may recover from David Steinberg on the judgment entered against Copy-Mor upon a proper showing that the corporate veil should be pierced. in these circumstances, the court finds that costs should not be awarded to David Steinberg. the judgment adequately reflects the court's ruling, and need not be amended.

6. Conclusion

For the reasons stated above, each of Defendants' motions is denied, and the judgment stands as entered.

IT IS SO ORDERED.

Dated: Feb. 7, 1995

CLAUDIA WILKEN
Claudia Wilken
United States District Judge

Copies mailed to counsel
as noted on the following page

Trial Testimony of David Ewer re October 14, 1991 meeting (Tr. 305-311):

Q. Now, referring to the agenda for the October 14th, 1991 meeting, this is something that you prepared?

A. Yes, Sir.

Q. And focusing on Item C, "Discussion of New Proposal," tell us where that meeting took place.

A. That meeting took place at my office on the Pacific Campus.

Q. What's the address there?

A. 2320 Fillmore.

Q. And who was present?

A. I believe, to the best of my ability, it was the Steinbergs, Leonard, Philip, David; and myself.

Q. Anybody else?

A. No.

Q. How long did the meeting last?

A. Fifteen to 20 minutes.

Q. All right. With respect to the discussion of new proposal, tell us what you said and what — tell us what was said at the meeting by you and the other persons present.

A. Again, to the best of my ability, I mentioned to the Steinbergs that I was interested in getting a proposal from them about the California Work, California Campus, and that's about as far as it went.

And then I believe the elder Mr. Steinberg immediately said, "what are you talking about? We already have a contract. We don't need to submit a new proposal." And he just got very upset and kind of blew up, and David and Philip tried to control him, and we ended the meeting.

Q. Well, did you —

A. So we didn't have much of a discussion.

Q. Let me see if I understand this correctly. First of all, you didn't think that Copy-Mor was a very good company?

A. I didn't make that conclusion at this meeting. I knew we had some problems that we needed to work on.

Q. Yet, despite these problems, you were asking them to submit a proposal to work at Pacific, but also at Children's?

A. Certainly.

Q. So the problems were not so great that you would have — in other words, if Copy-Mor had submitted a reasonable proposal, I take it that you would have accepted that?

A. Well, part of that decision process was going to be on customer service and that component. So, you know, that would have a factor in my decision.

Q. Yes, but you made the — you made the offer —

A. Yes —

Q. When you told them you wanted them to submit a proposal for the California Campus, did you have no intention that you would ever accept them at the California Campus, or was your offer in good faith, or what?

A. My offer was in good faith at that time, sure.

A. So as of October 14th, 1991, based on everything you knew about Copy-Mor, if their new proposal for handling both campuses was acceptable to you, you would have taken them on not only at Pacific, but also at Children's?

A. That's right.

Q. Now, I don't understand why — have you seen Exhibit 1, the contract is this case?

A. Yes, I have.

Q. And does that — in paragraph 1 of that contract, is there a reference made to — is there a reference made to — now, this meeting with the Steinbergs at which you made the — suggested the discussion of the new proposal, that was before these questionnaires were sent out, is that right?

A. Yes.

Q. The contract indicates that — does make a provision for the possibility of a merger, doesn't it, on page 1, at the bottom of paragraph 1?

A. It makes mention of that, yes.

Q. In other words, it says, "in the event of any mergers or purchases of other health care operations by buyer," and "buyer" would be Pacific, right?

A. It was an equal merger. I mean I think in this document, yes, the buyer meant Pacific.

Q. "In the event of any mergers or purchases of other health care operations by buyer, then buyer would use its best efforts to encourage participation of these operations in this agreement, if buyer is authorized to do so under the terms of merger or participation."

Now, you had read this contract prior to your meeting with the Steinbergs in October?

A. Yes.

Q. And that would indicate — doesn't that indicate to you that the Steinbergs and Copy-Mor were interested in doing business at the Children's Campus?

A. Not necessarily. I mean why would that — no.

Q. Okay. I don't understanding why, if you merely suggested to Mr. Steinberg — tell us, as best you can, the substance of the words that you addressed to him.

A. I absolutely cannot remember that, so I don't know the exact content.

Q. Why is it he would become angry if you merely said to him, "I would like you to make a proposal for the California Campus"? Why would that make him mad?

A. That's an extremely good question. I have no idea.

Q. Let me suggest the answer is that you suggested to him that he should disregard his contract at Pacific.

Mr. Schofield: Object as argumentative, Your Honor.

The Court: Overruled. Rephrase it.

By Mr. Alioto:

Q. Did you not at this meeting, in substance or in effect, tell Mr. Steinberg that you wanted him to put aside or disregard his — the Copy-Mor contract with Pacific and submit a proposal for both campuses?

A. Again, I don't — I can't remember my exact verbiage, but I did, yes, indeed, ask the Steinbergs to present a proposal for the California Campus.

Q. And did not the presentation of that proposal imply or assume that you had made the decision — that you made that — let's back up a little bit.

You suggested that also to your — to Ms. Arthur at —

A. Med-Forms?

Q. Med-Forms and the fellow at KP Graphics, did you not?

A. John Wall?

Q. Yes.

A. I'm sure I indicated that to them, as well.

Q. Did you — and did you indicate to Mr. Steinberg that you were going — that he should submit a proposal to you for both campuses, and that you would make a decision as to whether or not — as to who you would accept on both campuses, which printing vendors? And did you indicate to him that if Copy-Mor was not accepted, that Copy-Mor would not be on either campus?

A. I don't believe that we had that long of a conversation. I don't remember. But it was very short.

The mention of a contract literally sent him through the roof, the mere mention of a contract. So I don't remember the exact verbiage.

Q. What contract was mentioned?

A. Again, my request for a proposal for the California Campus. And that's about as far as I got. There was no substantive conversation about that at all that I can remember.

Q. Did you think that he could reasonably conclude from what you were saying to him that you were not going to — you did not intend to honor your contract at the Pacific Campus?

A. I don't know what he would conclude from what I said. I don't know.

Q. You were there. You know what you said.

A. I know what I said.

The Court: I think we have everything that he can infer about it, and we will go on to something else.

* * *

Trial Testimony of Leonard Steinberg re October 14, 1991 meeting (Tr. 1516-1617):

Q. Do you recollect meeting with Mr. Ewer at an initial get-acquainted meeting in San Francisco with your sons, Mr. Blair, Mr. Ewer, Mary Jacobson?

A. That I remember. It was right on the street that the purchasing department is at. I forget what street that is.

Q. Do you recall a subsequent meeting with Mr. Ewer in his office in San Francisco?

A. Yes.

Q. Tell us what happened at that meeting.

A. Basically, he said that he had two other printing companies, I think it was two, and we would be the third one, and he would make a decision between the three.

And I objected to that. I said, "We already have a contract for five years."

He said — Well, I can't quote him word for word because I can't remember exactly what he said, but I was very upset about it.

And he said that's it, and so forth, and dismissed it. My son Philip was with me, too. I can't remember if he said anything or not. I can't remember really.

Q. He said — Now, this is after the merger, I take it?

A. After the merger.

Q. Okay. And he said he had three printing companies and what? I'm sorry.

A. He has two printing companies at present, and we would be the third one, and he would make a decision between the three on whom he would decide — which one would go. He only wanted two.

Q. Did he ask you to make some kind of an offer or a proposal to him?

A. None whatsoever. None.

Q. Did you on this occasion mention the contract?

A. I mentioned the contract to him.

Q. What did he say, if anything, about that?

A. He just ignored what I was saying to him basically. He just — I took it — my opinion, I took it as just —

Mr. Schofield: I object to what his opinion is, Your Honor.

* * *

Testimony of Philip Steinberg re October 14, 1991 meeting (Tr. 1224-1226):

Q. All right. And will you describe what was said in substance at that October — Where was that October 14th meeting?

A. The meeting subsequent to the lunch meeting?

Q. Yes.

A. We were in Dave Ewer's office.

Q. Okay. Who was there?

A. Dave Ewer, my father, and myself.

Q. Anybody else?

A. No, that was it.

Q. Would you tell us, in substance and effect, what was said at that time by the persons present?

A. Dave Ewer said, "I've got — I'm running both campuses now. I've got three forms vendors and I'm going to reduce it down to two."

And he said that, "I want you to set your contract aside and submit a bid with the other two vendors to bid on both campuses."

Q. Were those his exact words, or was that the substance of what he said, "I want you to set your contract aside"? Did he say that in substance?

A. Pretty much that. Maybe one word or two words were different, but that's what he said.

Q. Now, that else was said by, for example, the other persons present?

A. When he said that my father and myself said, "We've got a contract here for five years. We're not going to set our contract aside and then go bid with everyone, and you can make a decision and pick who you want.

"If you want us to make a bid for the other hospital and keep our contract for Pacific, we would do that."

Q. Okay. All right. And then what happened?

A. He said, "No, no, I'm going to eliminate a vendor and I don't want to do it that way. I want everybody to start equal and quote on the two hospitals."

And we said, "We're not doing that. We have got contractual rights.

Q. Okay. Then what happened?

A. Then the meeting was just about over.

Q. Now, about two weeks after that meeting, did you write a letter to Mr. Ewer — in other words, did this kind of give you an idea that there might be some handwriting on the wall, this October 14th meeting?

Mr. Schofield: Object as leading and suggestive.

The Court: Sustained.

By Mr. Alioto:

Q. What were your own personal feelings at this point, Mr. Steinberg, about how secure you were in this contract?

A. I knew after that meeting that Dave Ewer was going to try to throw us out and put his own vendors in the California Campus. It was obvious.

AGREEMENT

AGREEMENT made September 17, 1990, and effective as of January 1, 1991, by and between COPY-MOR, INC., an Illinois corporation (hereinafter referred to as "Seller") and PACIFIC PRESBYTERIAN MEDICAL CENTER, a Not For Profit California corporation (hereinafter referred to as "Buyer").

1. Purchase of Requirements. Buyer shall purchase from Seller and Seller shall sell to Buyer all of Buyer's printing requirements for all inventoried and noninventoried forms, letterheads, envelopes and business cards. Buyer also agrees to purchase the majority of its other printing needs from Seller except these printing requirements for which Speedway Printing has the ability to print locally which are priced competitively with Seller's offer as reasonably determined by Buyer. Except as provided for hereinabove, it is the intention of Buyer to use Seller as its sole distributor where feasible. The term "printing requirements" as used herein shall include, but shall not necessarily be limited to, all continuous business, billing and other forms, stationery, marketing brochures, newsletters, menus and artwork used by Buyer in its business. In the event of any mergers or purchases of other health care operations by Buyer, then Buyer will use its best efforts to encourage participation of these operations in this Agreement if Buyer is authorized to do so under the terms of merger or participation.

2. Price List; Adjustment of Price. Buyer and Seller agree that the price list attached hereto as Exhibit A and hereby incorporated herein shall apply to all purchases and sales hereunder. Buyer and Seller further agree that the price list may be modified from time to time upon mutual agreement of Buyer and Seller. In year one (1) of this Agreement, Seller agrees to provide Buyer with an average price five percent (5%) below current forms price when quantitie of forms ordered, format of forms ordered, and

content of forms ordered remain unchanged. The price of any item(s) purchased and sold hereunder not listed on Exhibit A shall be mutually agreed upon by Buyer and Seller.

3. Delivery. Deliveries of all goods purchased hereunder shall be made by Seller F.O.B. Buyer's place of business, which shall be one centralized location in , California, or to such other single location as shall be designated in writing by Buyer from time to time.

4. Consultant. Seller hereby agrees that it will have an employee or agent available to meet and consult with Buyer and to service Buyer's account as requested by Buyer during the term hereof. Services that will be provided by the Seller are, but not limited to:

a. new form layout and design;

b. consultation with various Buyer's staff of approved deparments.

c. forms consolidation and reduction;

d. inventory maintenance;

e. professional and cost effective recommendations on all non-stock printing needs;

f. immediate response and satisfactory resolution of all printing out-of-stock situations, regardless of fault;

g. professional and business-like manner presented by all representatives of Seller;

h. semi-annual written reports summarizing forms activity and cost savings efforts, including total dollars, total items printed, total new items, and total items deleted; and

i. Seller will provide warehousing and distribution by Stuart's at no charge to the Buyer.

j. Seller will catalogue all of Buyer's forms within six (6) months following execution of this Agreement. Catalogued forms shall be compiled by the Cost Center Department and a set of such catalogues shall be provided to the Medical Center.

5. Seller guarantees that all work will be inspected in Seller's plant prior to shipment and Seller further guarantees the quality of all products sold to Buyer by Seller.

6. Term. The term of this Agreement shall be for a period of five (5) years, beginning January 1, 1991, and expiring on December 31, 1996. This Agreement may be terminated prior to its term only in the event of a material breach. For purposes hereof, a "material breach" shall be defined as a substantial lack of performance. In the event of a material breach by a party (herein referred to as the "breaching party"), the non-breaching party shall notify the breaching party in writing of its material breach and the breaching party shall have thirty (30) days from receipt of the notice in which to cure such breach. In the event that the breach is not cured within such thirty (30) day period, then this Agreement shall terminate thirty (30) days from the date the notice of material breach is received by the breaching party. The Buyer's decision shall be final as to whether a breach by Seller has been cured, provided that the Buyer exercises reasonable judgment in such decision.

7. *Change of Forms; Early Termination.* In the event that Buyer desires to change a form or any other item currently being supplied by Seller hereunder, then in such event, Buyer shall continue to be obligated to purchase all authorized committed forms provided Seller stocks such a quantity in his facility due to usage and cost considerations.

8. *Payment.* Buyer has requested Seller to ship certain products directly to Stuart's. Products shipped directly to Buyer shall be paid by Buyer; products shipped directly to Stuart's will be paid by Stuart's Buyer shall pay the invoice received by Buyer within thirty (30) days from the date thereof.

9. *Inventory Levels; Savings.* As a result of the warehousing arrangement with Stuart's, consolidation, improved inventory control and ordering procedures as well as the favorable pricing of Buyer's printing requirements hereunder, the parties intend that this Agreement will result in cost savings to Buyer. The parties agree to use their best efforts to reduce Buyer's forms by twenty-five percent (25%) through consolidation. Provided that Buyer maintains its level of purchasing of the period January 1, 1990 through December 31, 1990 as described to Seller, then Seller further agrees that Buyer will enjoy a minimum annual cost savings of $50,000.00 during year one of this Agreement as the result of the arrangement with Stuart's, consolidation of forms, improved inventory control and ordering procedures as well as the favorable pricing of Buyer's printing requirements. In the event that Buyer does not receive such savings, then Seller will pay the difference in a cash payout within ninety (90) days following close of year one's full term of business and computation of such savings provided that Buyer's dollar usage does not decrease from previous years.

10. *Space and Operations.* Seller agrees to provide on-site Staff for forty (40) hours per week for a minimum of six (6) months and a maximum of one (1) year following execution of this Agreement as reasonably determined appropriate by Buyer and at no expense to Buyer. Buyer shall provide to Seller at no charge, suitable office space in its facility for the purpose of conducting business. The Seller

shall be obligated to consult with the Buyer in the maintenance of its forms storage and distribution area.

11. *Construction.* This instrument is intended by the parties as a final expression of their agreement and as a complete and exclusive statement of its terms. No representations, understanding, or agreements have been made or relied upon in making this Agreement other than those specifically set forth herein. This Agreement can only be modified in writing and signed by both parties or their duly authorized agents.

12. *Benefit.* This Agreement shall be binding upon and inure to the benefit of the successors and assigns of the respective parties.

13. *Notices.* For the purpose of any notice required to be given by this Agreement or under any applicable provision of the law, Seller represents that its principal place of business is 1716 West Grand Avenue, Chicago, Illinois 60622, Attention: Leonard Steinberg, President; and Buyer represents that its principal place of business is P.O. Box 7999, San Francisco, California 94120.

14. *Applicable Law.* This Agreement shall be construed and performed in accordance with the Uniform Commercial Code as it is in force in the State of California.

IN WITNESS WHEREOF the parties have executed this Agreement on the day and year first above written.

COPY-MOR, INC.

By: /s/ LEONARD STEINBERG
President

Dated: Oct. 18th, 1990

PACIFIC PRESBYTERIAN
MEDICAL CENTER

By: /s/ CHARLES R. BROWN
Charles R. Brown
Materials Manager

Dated: 10/18, 1990